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No. 07-132

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

2025 EMERY HIGHWAY, LLC,

Petitioner,

v.

BIBB COUNTY, GEORGIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF

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REPLY BRIEF

From the beginning, the respondents exploited the Sheriff's "law enforcement capacity" to find witnesses to defend Club Exotica's lawsuit against the County. (*See* App. 1.) In the end, the Sheriff (through his attorney) presented the County's case-in-chief in the appeal hearing to revoke the club's alcoholic beverage license, offering evidence he gathered in his August 16 raid, i.e., the culmination of Sheriff's investigation. (*See* App. 2-3.)

Club Exotica seeks summary reversal of the Eleventh Circuit's decision that the Sheriff was a state actor in this case. *See* Pet. for Cert. at 30. However this Court envisions *Hess*,[1] *Doe*,[2] and *McMillian*[3] as applying to § 1983 actions, the Sheriff was not entitled to Eleventh Amendment immunity here. The Eleventh Circuit's decision to grant him immunity suggests that its arm-of-the-state test is the doctrinal equivalent of tossing a two-headed coin.

A. The Circuit confusion.

The respondents say that "no conflict of opinions" exists, and that *McMillian* "clearly answers the question" presented by Club Exotica. Opp. at 11. "The decision of

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[1] *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994).

[2] *Regents of the Univ. of California v. Doe*, 519 U.S. 425 (1997).

[3] *McMillian v. Monroe County*, 520 U.S. 781 (1997).

the lower court," they claim, "is in complete agreement with the Supreme Court's holdings." *Id.*

This Court knows its jurisprudence. It might believe that the arm-of-the-state test needs clarification; it might not. Either way, since *McMillian*, Circuit courts have adopted different tests for determining whether local officials (e.g., sheriffs) are exercising state authority and are thus immune under the Eleventh Amendment in § 1983 suits.[4] Granted, *McMillian* requires an analysis that is both state- and function-specific; so the differences in outcomes certainly may be chalked up to state-specific analysis. *See McMillian*, 520 U.S. at 795 ("Thus, since it is entirely natural that both the role of sheriffs and the importance of counties vary from State to State, there is no inconsistency created by court decisions that declare sheriffs to be county officers in one State, and not in another.") (footnote omitted). But the federal immunity factors are inconsistently applied.

The problems are two-fold. First, it is unclear which considerations discussed in *McMillian* overlap with this Court's Eleventh Amendment arm-of-the-state jurisprudence, including factors recited in *Doe*, cited in

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[4] *E.g.*, the Fourth, Fifth, Seventh and Ninth Circuits restrictively apply *McMillian* and this Court's arm-of-the-state cases. *See Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 221 (4th Cir. 2001); *Cozzo v. Tangipahoa Parish Council-President Gov't*, 279 F.3d 273, 281-83 (5th Cir. 2002); *Franklin v. Zaruba*, 150 F.3d 682 (7th Cir. 1998); *Brewster v. Shasta County*, 275 F.3d 803, 807-08 (9th Cir. 2001). The Second Circuit, like the Eleventh Circuit, has broadly construed *McMillian* in its arm-of-the-state cases. *Huminski v. Corsones*, 396 F.3d 53 (2d Cir. 2005).

McMillian, 520 U.S. at 786, and earlier decisions such as *Hess*. *McMillian*'s considerations for § 1983 officer status seldom dovetail with the factors for "arm-of-the-state" analysis. *Compare McMillian* 520 U.S. at 785-92 (emphasizing state law characterization of sheriff's office and state control over sheriff's activities), with *Hess*, 513 U.S. at 47-51 (degree of financial independence of entity matters more than extent of state control over the entity's activities).

Second, and if it is proper to import Eleventh Amendment arm-of-the-state analysis into § 1983 officer status determinations, the arm-of-the-state test itself is confusing lower courts. *Hess* did not answer whether the legal liability of the state for the judgment is the most important factor or the only factor to be considered. *See, e.g.*, Héctor G. Bladuell, Note, *Twins or Triplets?: Protecting the Eleventh Amendment Through a Three-Prong Arm-of-the-State Test*, 105 Mich. L. Rev. 837, 842 (2007); *see also Alkire v. Irving*, 330 F.3d 802, 811-12 (6th Cir. 2003) (citing *Brotherton v. Cleveland*, 173 F.3d 552, 560-61 (6th Cir. 1999)) (stating that, after *Hess*, it is unclear whether the question of who pays a damage judgment against an entity is the only factor or merely the principal one in the arm-of-the-state analysis); *see also Sturdevant v. Paulsen*, 218 F.3d 1160, 1166 (10th Cir. 2000) (citing *Duke v. Grady Mun. Sch.*, 127 F.3d 972, 978 (10th Cir. 1997)) ("[E]ven after *Hess* and *Doe*, which emphasized the primacy of the impact on the state treasury as a factor in determining immunity, other factors remain relevant.")). While some courts

have followed the holding in *Doe* (that the key issue is the state's legal liability for an adverse judgment, rather than the practical impact of the judgment on the State's treasury),[5] the Eleventh Circuit has granted immunity based on practical impact alone. *Bladuell*, *supra*, at 842-43 (citing *Manders v. Lee*, 338 F.3d 1304, 1327-28 (11th Cir. 2003) (en banc)).

Even though *McMillian*'s application outside Alabama presents challenging questions for lower courts, one thing is clear: the Eleventh Circuit's decision cannot be correct under any standard. A prevailing test to resolve the issue of § 1983 liability would be helpful.

B. The record.

Throughout this litigation, the respondents have accused the club of misstating facts. *See*, *e.g.*, Opp. at

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[5] The Third, Fifth, and Ninth Circuits have asked whether, under state law, the state would be legally liable for the judgment against an entity to evaluate whether the state treasury factor is met. *See Indep. Enters. Inc. v. Pittsburgh Water and Sewer Auth.*, 103 F.3d 1165, 1173 (3d Cir. 1997); *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 328 (5th Cir. 2002); *Eason v. Clark County Sch. Dist.*, 303 F.3d 1137, 1142-43 (9th Cir. 2002). Some Circuit courts have explicitly rejected arguments that the practical impact of a judgment on the state's treasury is relevant. *See Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1182 (9th Cir. 2003); *Fresenius Med. Care Cardio. Res., Inc. v. P.R. & the Caribbean Cardio. Ctr. Corp.*, 322 F.3d 56, 75 (1st Cir. 2003) (citing *Metcalf & Eddy, Inc. v. P.R. Aqueduct & Sewer Auth.*, 991 F.2d 935, 941 (1st Cir. 1993)); *Vogt v. Bd. of Comm'rs*, 294 F.3d 684, 693 (5th Cir. 2002).

8. They describe the club's petition as "rambling," "highly selected and incomplete" and "in part inaccurately stated." Opp. at 12. Yet they do not identify a single inaccuracy. Their gripe, though they do not say it, is with the inferences drawn from the undisputed facts. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.").

The respondents do not dispute that (1) in response to this lawsuit, they stepped-up an open-ended, criminal investigation looking for "any violations" at the club [Doc. 26 at 8; Doc. 151 at 29, 48; Doc. 153 at 6-7]; (2) they trailed customers and employees leaving the club, and, in some cases, pulled them over for pretextual reasons (searching for witnesses who could support a license revocation or defend this suit) [Doc. 148 at 24; Doc. 164 at 79-80; Doc. 166 at 46-50, 67]; (3) they frequently ran license plates of cars parked in (or leaving) the club's parking lot [Doc. 162 at 33, 42-43, 62, 65-66, 74; Doc. 164 at 59], though lacking suspicion of any criminal activity [*compare* Doc. 165 at 25; Doc. 156 at 95 (testifying that suspicion of criminal activity or even probable cause was the BCSO's threshold policy for running license plates)]; (4) the BCSO raided the club (without a warrant) in response to Club Exotica's August 15, 2003 threat-to-sue letter [Doc. 156 at 72; Doc. 151 at 88-89], where officers arrested 16 female dancers – most

without even arguable probable cause [Pet. for Cert. at 26]; (5) during the raid the manager's office was searched [*id.* at 16 n.9]; (6) the dancers arrested for "masturbation for hire" or "public indecency" were either acquitted or their charges were dismissed [*id.* at 19]; and (7) the club was forced to close as a result of the raid and alcohol license revocation [*id.* at 20-21]. Nor do they dispute Bibb County's effort to apply content-based legislation (adopted without evidentiary support) against the club. [*Id.* at 8-9; Opp. at 14-15.]

The parties do agree on a couple of items. First, this case is about whether the club was honoring county ordinances. *See* Opp. at 4 ("Petitioner now approaches the Supreme Court in an attempt to defeat the prior rulings that it cannot serve alcohol in a strip club in contravention of the applicable ordinances."). And second, "the Sheriff would have no need to raid an alcohol-licensed establishment in order to revoke its license for allowing nude dancing. . . ." Opp. at 21.

They disagree on other items. First, the respondents say that violations of "state statutes regarding simulated sex acts, sodomy and masturbation for hire were being routinely committed." Opp. at 16. It was not proven that this conduct occurred on the night of

the raid. Never mind that these and other salacious allegations were disputed issues below.[6]

Second, the Sheriff says that the club (through its attorneys) "invited" him to raid it. Opp. at 18. That assertion, startling as it is, is disputed but based on facts which are not misstated. *See* Pet. for Cert. at 13 n.13. Third, the Sheriff says the club "mischaracterizes the nature and the thrust of the Sheriff's investigation." Opp. at 20. He says:

> Although the Sheriff did undertake to investigate whether or not the establishment was

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[6] *See* Docs. 53 at 19; 55 at 21-22; 56 at 31-32; 61 at 26 (patrons subpoenaed by the County testified that no drugs or drug activity occurred in club); *see also* Docs. 53 at 36-37; 55 at 19, 34; 56 at 23-25, 28-29; 61 at 42-43 (patrons subpoenaed by the County testified that club strictly enforced house rule prohibiting dancers from allowing patrons to touch dancers' genitals); Doc. 148 at 17 (deputy testified that he did not observe violations at club); Doc. 165 at 83-84 (deputy testified that he did not find club's dance performances lewd or offensive). Strict enforcement of house rules was confirmed by patrons, employees and ex-employees alike. [*See, e.g.*, Docs. 60 at 38-39; 165 at 31; Doc. 147 at 21, 33.] The club's security was so thorough that the BCSO's undercover officers worried that entrance pat-downs would discover their surveillance equipment. [Doc. 162 at 53-54; *see also* Docs. 53 at 8, 23-24; 54 at 25 (patrons testified that managers and security personnel were continuously patrolling the premises); Doc. 165 at 31 (deputy testified to same).] The respondents fail to mention that, before the club stated its intention to "go nude," it employed off-duty Macon police officers to provide security and enforce house rules. [*See* Doc. 61 at 34; Doc. 60 at 26-27; Doc. 56 at 38.] These officers resigned conspicuously after the Sheriff found out about their employment. [*See* Doc. 162 at 83-84; Doc. 156 at 87-88.]

> in compliance with county ordinances, that phase of the investigation ended with the Sheriff's conclusion that it was not and his recommendation to the Board that the current license be revoked and the new application denied. No raid was necessary for that.

Opp. at 20.

Again, this assertion is disputed – by the Sheriff himself. According to the Sheriff, Almand's roles in communicating with him (1) to advise in the undercover criminal investigation, and (2) to defend this civil lawsuit, were inseparable. Pet. for Cert. at n.3. If the Sheriff wore two hats, he was confused about which one he was wearing.

Finally, although the respondents do not dispute that South Beach was "experiencing problems with drugs, beatings, rapes, stabbings, underage sales and racial discrimination" while the Club Exotica Investigation was pending, they note that Club Exotica "fail[ed] to state that South Beach is not a strip club and does not feature nude dancing." Opp. at 22. Exactly. As the Sheriff testified:

> Q: . . . Has South Beach had any crime on the premises?
>
> A: We'll we've had some young people drinking. We've had some thefts out there, things of that nature. No nude dancing.
>
> Q: Have you had any shootings?

A: No – yeah. No. No. None that I recall. We've had no shootings out there. We had a stabbing.

Q: You had a stabbing?

A: We've had no lap dancing. . . .

[Doc. 104, Attachment # 9 at 33; *see also* Doc. 149 at 52-53 (indicating that the BCSO treated Club Exotica differently from otherwise similarly situated night-clubs because of the nude dance entertainment); Doc. 156 at 33 (Sheriff testified that the club's billboards stating, "'Going Nude Tonight' didn't help matters").] Contrary to the respondents' representation, raids were not carried out at South Beach because the BCSO did not want to "disrupt the business." *See* Doc. 162 at 92; *compare* Opp. at 22 (citing Doc. 162 at 90).

C. The "character of the function" that gave rise to this litigation.[7]

The Sheriff is a "county officer." Ga. Const., Art. IX, § 1, ¶ 3(a). No one disputes that (1) the BCSO served as the County's representative in this lawsuit (Pet. for Cert. at 11), (2) the BCSO acted on behalf of the County when investigating the club (Opp. at 20), and (3) the Sheriff is a "county officer" (Pet. for Cert. at 10 n.5). From beginning (the initial alcohol license application) to end (the raid and alcohol license revocation based partly on that raid) the Sheriff,

[7] *Doe*, 519 U.S. at 431-32.

represented by the County Attorney, called the shots. Retreating from his "arm of the county" status for Eleventh Amendment purposes is not unexpected; an arm-of-the-state test which allows him to do so is.[8]

The Sheriff describes his role as a "bifurcated" one: sometimes a state-law enforcer, sometimes a county-law enforcer. *See* Opp. at 24. The respondents say that "[i]t is well-settled that a sheriff enforcing county ordinances is not acting as an arm of the state and is not, in that role, entitled to Eleventh Amendment immunity." Opp. at 6 (citations omitted). Conversely, they say that "Eleventh Amendment immunity protects the Bibb County Sheriff's Office from suit in federal court for its actions in carrying out arrests for violations of state law." Opp. at 10. The mantra that rings throughout their brief is that state-law crimes were the issue, not county laws. *See* Opp. at 2, 4, 5, 6, 16-17, 20, 23-25.

With this in mind, the Sheriff argues that his roles "can be separated and identified as one or the other based on the primary intent of his actions." Opp. at 24. If his *intent* governs whether the Sheriff was an "arm of the state," two things are true: (1) if the Sheriff's intent is disputed, a question of fact exists on whether Eleventh Amendment immunity applies, and (2) the Sheriff may insulate himself from liability by changing his mind about why he acted as he did. *Compare McMillian*, 520 U.S. at 796 (recognizing petitioners' concern that state and local governments will manipulate the titles of local officials in a blatant effort to shield the local

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[8] *Hess*, 513 U.S. at 62 (O'Connor, J., dissenting).

governments from liability, but noting "there is certainly no evidence of such manipulation here."). If the respondents believe in this proposition, that might explain why the Sheriff and County Attorney omitted any reference to county ordinances when they planned and authorized the BCSO to carry out its second-largest raid.

CONCLUSION

The State of Georgia's real, immediate control and oversight over sheriffs is minimal. In this case, it is nonexistent. For this and reasons stated in the Petition, the club asks this Court to (1) summarily reverse the Eleventh Circuit, or (2) grant the petition and clarify the law.

Respectfully submitted,

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Attorneys for Petitioner
2025 Emery Highway, LLC

App. 1

Memo

To: All Drug Squad Investigators that worked the Café Exotica case

From: Captain Eason

Date: 06-04-02

Re: Chief Allen wants everybody that worked at the club and went inside to look at the video and write down what was taking place while they were there.

He wants us to go back out there just the guys and get tag numbers of who is going in there and find a reason to pull them over and get them identified for possible witnesses.

"Note" for Inv. Johnson the Chief wanted to know if you had any other way of putting a video camera in a hat or something like that.

[SEAL]

Office of the Sheriff
Bibb County Georgia
P.O. Box 930
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(478) 746-9441
FAX (478) 621-5681

Jerry M. Modena, Sr.
SHERIFF

James W. Allen
CHIEF DEPUTY

August 21, 2003

Via Hand Delivery
Tommy C. Olmstead, Chairman
Samuel F. Hart, Sr., Vice-Chairman
Charles W. Bishop
Bert Bivins, III
Elmo Richardson
Bibb County Board of Commissioners
P.O. Box 4708
Macon, Georgia 31208-4708

Re: 2025 Emery Highway, LLC d/b/a Club Exotica Recommendation of Revocation for Current Alcoholic Beverage License

Dear Gentlemen:

As you are aware, I wrote you a letter on July 22, 2003 recommending the revocation of 2025 Emery Highway, LLC d/b/a Club Exotica's current alcoholic license. Previously, my recommendation to you was based on conduct occurring prior to July 3, 2003, and I must now advise you of additional conduct which I wish to include as the basis of my recommendation,

based on recent events occurring at Club Exotica. Therefore, I now wish to expand my original information provided to you as the basis for my recommendation for denial of the Club's alcoholic beverage license.

Since July 3, 2003, Club Exotica and its employees have engaged in many more types of conduct that violate local ordinances and state law. It appears that Club Exotica has made a mockery of the claimed First Amendment protection for artistic expression, when the conduct of its employees amounts to what state law describes as public indecency, masturbation for hire, and many other actions which violate both local and state law. In addition to violating Bibb County's local ordinances, including Section 3-33, 3-35 through 3-39, 3-53 and 3-71(c)(1)-(4), Club Exotica has violated O.C.G.A. § 16-6-8, the public indecency and obscenity law and O.C.G.A. § 16-6-16, the state statute describing masturbation for hire.

On August 16, 2003, my officers made approximately sixteen (16) arrests of entertainers and employees of Club Exotica on charges of masturbation for hire. Specifically, the employees and entertainers were engaging in the following types of conduct: accepting tips for lap dancing, which is nothing more than sitting in a patrons lap, genital to genital, and grinding and gyrating on the patron's lap, accepting tips for exposing their vagina, accepting tips for fondling their vaginas and breasts while sitting on patrons' lap or standing in front of patrons, accepting tips for fondling patrons' groin area, accepting tips for exposing pierced vaginal areas to patrons, accepting

tips for simulating oral sodomy on patrons, and accepting tips for fondling exposed genitals of patrons. As to each action listed above, the "entertainers" accepted payment for the conduct engaged in. These actions clearly violate the state's statute O.C.G.A. § 16-6-16, in that the conduct amounts to masturbation for hire.

Additionally, there were many acts of public indecency which have occurred at Club Exotica since July 3, 2003. These acts include the lewd and vulgar display of genitalia and other specified anatomical areas, oral sodomy, and sexual intercourse. Again, each of these actions are in violation of O.C.G.A. § 16-6-8, the public indecency and obscenity law.

I request that this post-July 3, 2003 conduct to be included as evidence at a hearing on my recommendation of revocation of Club Exotica's current alcoholic beverage license. The conduct described in this letter will definitely serve as part of my basis for my official recommendation that the Bibb county Board of Commissioners for Bibb County, Georgia, take the appropriate action in revoking Club Exotica's current alcoholic beverage license.

Sincerely,

/s/ Jerry Modena
Jerry Modena

cc: ***Via Hand Delivery***
O. Hale Almand, Jr., Esq.

Via Hand Delivery
Bibb County Board of Commissioners